In many cases what seems to have been left to the jury was the inference of probable cause, but on analysis it appears that it was only one of the preliminary questions of fact just stated.[24] Very often, too, the courts themselves think they are discussing reasonable and probable cause, when actually they are considering one of the preliminary questions of fact. Thus in *Comerford* v. *Morwood*,[25] the court states that "under the circumstances it was for the jury to say whether the defendant caused the criminal action against the plaintiff to be instituted without probable cause", and then goes on to say that "where there is a substantial dispute as to what the facts are, it is for the jury to determine what the truth is and whether the circumstances relied on as a charge or jusification are sufficiently established, and for the court to decide whether they amount to probable cause." Two more contradictory statements could hardly be found.

There is little doubt that the common law rule is that the inference of probable cause, though a question of fact, is for the court. This rule has been criticized[26] and appears to have been altered by the New York courts. While the courts may feel that a change is necessary, much confusion would be avoided among the appellate courts and much error in the trial courts, if the judges were to state their opinions in clear language and realize the true meaning of their statement.

CURRENT LEGISLATION

SMALL CLAIMS COURTS IN THE UNITED STATES.—Recent Massachusetts legislation, which alters materially the method of settling small claims, is of peculiar interest due to the discussion aroused during the past year by the publication of Mr. Reginald Heber Smith's "Justice and the Poor."[1] The Massachusetts enactment is the latest of a series of provisions passed during the last ten years by American legislatures for the purpose of improving inferior courts.

It provides[2] that the justices of police, district and municipal courts shall make uniform rules applicable to such courts, for the purpose of determining according to substantive law claims in contract and tort, other than actions for libel and slander, where the amount claimed is less than thirty-five dollars. Justices of the city of Boston are to make separate rules for the regulation of the courts of that city. Payment of a fee of one dollar, and a statement of claims to a clerk of the court

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[24]Panton *v.* Williams, *supra,* footnote 12, at pp. 193-194.

[25](1916) 34 N. Dak. 276, 158 N. W. 258, 260. Also see similar contradictory and confused statements in March *v.* Vandiver (1914) 181 Mo. App. 281, 168 S. W. 824, 825; and Hanser *v.* Bieber (1917) 271 Mo. 326, 197 S. W. 68, 72.

[26]Thayer, *op. cit.,* 231. The Scotch law seems to be otherwise. See the statement of Lord Colonsay, a Scotch Lord, in Lister *v.* Perryman, *supra,* footnote 3, at p. 521.

[1]Carnegie Foundation for the Advancement of Teaching, Bulletin No. 13, (1919).

[2]Mass., Acts 1920, c. 553.

are all that is required to start proceedings. Service of summons may be made by registered mail; and all rules of pleading and procedural details, such as costs, stays, *etc.*, may be modified or disregarded. The plaintiff is held to have waived jury trial and appeal by his filing of claim; the defendant may obtain a jury trial upon making an affidavit showing sufficient facts and that the request is made in good faith, and upon payment of an additional fee. The rules may provide that the plaintiff who brings his action in the superior court may forfeit his costs where it appears that he could have availed himself of the small claims court.

Small claims statutes in the various states, while tending toward the same end,—speed and small cost in the setttlement of small disputes,—do not agree as to the details by which that end is to be reached. The differences in the main exist in those provisions dealing with: (1) the force of the decree, (2) the size and kind of claim which may be litigated, (3) the method of service of summons, (4) provisions for jury trial and appeal, and (5) the exclusion of attorneys from proceedings.

Most courts of the type created by this legislation have been loosely denominated conciliation courts, although differing widely in the force of their decree. Conciliation courts in the strict sense, however, seem to be those which have no power of any kind to enter a binding decree unless both parties consent thereto. These are of European origin,[3] but exist also in this country.[4] Small claims courts proper, on the other hand, are a regular part of the judicial machinery and have the power to enter a binding decree without an initial attempt at conciliation. They are differentiated from other courts mainly by a simple and direct procedure, calculated to dispose of cases quickly and cheaply, but still according to the rules of substantive law.[5] This type of court has reached its fullest development in the United States.[6] Again,

[3]Courts of conciliation are said to have originated in France in 1790. "Courts of Conciliation," (1895) 72 Atlantic Monthly 676. The duty of conciliation is still one of the chief functions of the French *juge de paix*. "The French Judicial System," (1909) 57 Penn. Law Rev. 285. In Denmark and Norway such courts (Forligs Kommission) have existed with great success since 1795. The proceeding before the courts of conciliation there is a prerequisite to trial before any other court in all civil actions. Grevstad, "Courts of Conciliation," (1891) 68 Atlantic Monthly 401.

[4]Minnesota, for disputes between fifty dollars and $1000, Minn., Laws 1917, c. 263; and New York, Lauer, "Municipal Court Code in the City of New York," Supp., 303 ff., set forth also in (1917) 57 New York Law Journal 337.

[5]This type of court exists in Kansas, Kan. Gen. Stat. (1915) § 3316 ff.; Illinois, Chicago Municipal Court Order of Feb. 26, 1916, pursuant to authority given in Ill. Ann. Stat. (J. & A., 1913) § 3332. *Cf.* Olds (1917) 1 Southwestern Law Rev. 100, and Oregon, Laws 1915, c. 327.

[6]The entire German court system seems to embody the distinguishing features of the small claims courts, but the procedure of the lower court is not so direct and speedy as that in the states just mentioned. Von Lewinski, "Courts and Procedure in Germany," (1910) 5 Illinois Law Rev. 193. The new German constitution has made no material change in the system. Baldwin (1920) 18 Michigan Law Rev. 743. The English County Court is also virtually a court of small claims, but has not yet been divested of all of the time-honored formalities. 3 Stephen, Commentaries (16th ed. 1914) 671.

arbitration, long looked on with disfavor by the common law,[7] has been given a place among judicial proceedings in several states.[8] The provisions for this method as applied to small claims differ from conciliation only in that both parties must agree before the proceedings to abide by the final award. Courts of mediation and arbitration for the settlement of labor disputes have been developed in many jurisdictions.[9] Finally, in Minnesota and Ohio[10] a proceeding usually termed conciliation, but which is in effect a combination of that and small claims methods,[11] has been introduced with unmistakable success.[12] These courts are probably the most perfect yet attempted, and the Massachusetts act might well have provided for an attempt at conciliation prior to the court action.[13]

Conciliation courts by themselves, however, are of doubtful value, if unaccompanied by an efficient small claims court to which litigants know that appeal lies; since fear of the delay and expense of a long litigation may compel one of the parties to accede to what seems to him an unfair settlement.[14] This is a kind of duress and not even a distant cousin of real conciliation. Moreover, the application of the principles of substantive law, manifestly not always possible in conciliation proceedings, is the best safeguard against capricious or thoughtless adjudication.[15]

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[7]See United States Asphalt Refining Co. *v.* Trinidad Lake Petroleum Co., Ltd., (D. C. 1915) 222 Fed. 1006 for an interesting and complete discussion of this point.

[8]New York, Lauer, "Municipal Court Code in the City of New York", Supp. 303 ff. The rules of the New York Municipal Court were passed pursuant to authority given in N. Y. Laws 1915, c. 279, § 6, subd. 6, § 8, subd. 5. (For provisions allowing enforcement of arbitration clauses in contracts, *cf.* N. Y. Laws 1920, c. 275.) Illinois, except as to disputes involving title to realty, Ill., Laws 1917, p. 202, as amended, Ill., Laws 1919, p. 216, Call. 1920 Stat., c. 10; and Ohio, 5 Ohio Ann. Genl. Code (P. & A., 1912) §§ 12148-12160. An arbitration law similar to that in New York has been in effect in England since 1889. Arbitration Act, 52 & 53 Vic. (1889) c. 49.

[9]For a full account of this type of court see (1917) 17 Columbia Law Rev. 174.

[10]Minn., Laws 1917, c. 263. The Ohio court was established under the Municipal Court Law, 1 Ohio Ann. Genl. Code (P. & A. 1912) § 1579, on March 15, 1913. (1915) 8 Bulletin American Judicature Society 11.

[11]In both states it is the duty of the judge to try to effect an agreement, but where this is found to be impossible, an adjudication is binding on both parties unless appealed from. For accounts of the working of these two courts, see "Justice and the Poor", 46, 48; (1915) 8 Bulletin American Judicature Society 4, (1914) 33 The Survey 101, (1915) 55 Colliers Weekly 27, (1920) 4 Journal American Judicature Society 70.

[12]The Cleveland court is said to have had only two appeals from a total of 36,000 cases decided in the last seven years. Harley (1920) 4 Journal American Judicature Society 70. In Minneapolis, in the year 1919, but one out of every 179 cases was appealed. *Ibid.*, 73. The costs of the average action in the Cleveland court come to a grand total of 87 cents. *Ibid.*, 70.

[13]The proposed conciliation law of Iowa contemplates a court of this type. (1920) 5 Iowa Law Bulletin 205.

[14]*Cf.* (1915) 8 Bulletin American Judicature Society 29.

[15]*Cf.* "Justice and the Poor", 45.

The experience of the last few years with courts in Minneapolis, Cleveland, Chicago, and other cities has been that an increase in the size of claim over which the court has jurisdiction is advisable.[16] It seems unfortunate that at a time when the value of the dollar is lower than ever, a limit as low as thirty-five dollars was placed on the jurisdiction of the courts by the Massachusetts legislature.[17] One hundred dollars has been found not to be too high for such claims,[18] and in New York and Minnesota[19] courts of arbitration and conciliation take jurisdiction up to $1,000. The exclusion of defamation from the classes of actions to be brought in the small claims courts is probably a wise provision, due to the comparative difficulty of ascertaining the facts involved.[20]

Again, the Massachusetts statute is somewhat cautious in its provision for the service of summons. Not registered mail alone, but ordinary mail,[21] telephone,[22] or word of mouth[23] are permitted as methods of service in several states, and the employment of such means manifestly increases the speed with which cases can be tried, without in any way prejudicing the rights of the defendant.

Provisions for jury trial are included in all legislation on the subject on account of the constitutional provisions guaranteeing it; and no system would be safe without reserving a right of appeal. The various enactments are in substantial agreement[24] as to the details of these provisions. The method usually used to prevent delay when jury trials are demanded is to have a jury continually sitting for the purpose of deciding small claims cases.[25] Thus the defendant gains nothing

[16]The Minnesota Bar Association has asked that the jurisdiction of the Minnesota court be raised from fifty dollars to $100. (1920) 4 Journal American Judicature Society 73.

[17]*Cf. Ibid.*, 75.

[18]This was the amount formerly allowed in the Chicago Municipal Court. *Cf.* (1917) 1 Southwestern Law Rev. 100. It has now been increased to $200. "Justice and the Poor", 55. This is also the limit set in the proposed conciliation law of Iowa. (1920) 5 Iowa Law Bulletin 205.

[19]N. Y. Laws 1915, c. 279, § 6 subd. 1, 6; § 8, subd. 5; Minn., Laws 1917, c. 263.

[20]The English County Courts cannot take jurisdiction of cases of libel, slander, breach of promise of marriage, or seduction, or of those in which title to realty is in dispute. County Courts Act, 51 & 52 Vic. (1888) c. 43, § 56. And the Municipal Court of Atlanta has no jurisdiction over cases involving injury to the person or reputation. Ga., Laws 1913, p. 159, sec. 27; (1914) 78 Central Law Journal 147.

[21]Kansas, New York, and Ohio.

[22]Kansas and Minnesota.

[23]Kansas and Minnesota.

[24]In Kansas and Oregon, as in the Massachusetts provision, the plaintiff is held to have waived his right to appeal and to a jury trial. Kan. Gen. Stat. (1915) § 3323; Oregon, Laws 1915, c. 327. In Illinois, Minnesota, and Ohio, either party may demand a jury trial, but in Minnesota, if the plaintiff appeals, he must pay costs unless his judgment is increased by at least ten dollars upon trial before the jury. Minn., Laws 1917, c. 263; (1917) 1 Southwestern Law Rev. 100, (1915) 8 Bulletin American Judicature Society 18.

[25]*Cf.* (1915) 8 Bulletin American Judicature Society 34.

by his appeal unless he has a *bona fide* case. An additional safeguard not adopted in the Masachusetts act is to provide that the defendant, in case he lose in the jury trial, be compelled to pay a stipulated sum to the plaintiff for attorney's fees;[26] and Minnesota has gone so far as to make him pay a part in case the damages are not reduced by certain specified amounts when the jury renders its verdict.[27]

While several of the states have thought it advisable to include provisions that expressly bar attorneys from small claims proceedings,[28] experience has shown that this is an unnecessary precaution. On the one hand the simplicity of the procedings makes the parties unwilling to employ counsel; and on the other, the profession has allowed the courts a free hand, and kept away from such actions of its own accord.[29] A supplementary provision, however, which makes this result even more certain, has not been included in the Massachusetts legislation. This is the creation of an advisory clerk's office, where parties are given directions and advice on points of law both before and after the trial.[30] There is every possibility, however, that such an office could be provided for by the rules to be made by the justices, since no restraint is put upon them by the act. And it may well be that other supplementary provisions, which have been found to work well in practice, such as the payment of judgments in instalments,[31] and the appointment of trustees to prevent oppressing debtors by garnishment proceedings,[32] will find their way into the Massachusetts procedure by this means.

Finally, a provision of the Massachusetts act which should cause its operation to be regarded with interest, is the application of the small claims court principles to the districts of the state where population is not so dense as in the large cities. All of the successful courts of the last decade have been in urban jurisdictions,[33] and, while it is true that four states[34] have constitutional provisions authorizing state-wide con-

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[26]Usually fifteen dollars. This provision is in force in Kansas, Minnesota, and Oregon.

[27]Minnesota, Laws 1917, c. 273.

[28]Kansas, Minnesota, New York, in conciliation proceedings, in the discretion of the court, and Oregon.

[29]*Cf.* Resolutions of the Chicago Bar Association, quoted in (1915) 8 Bulletin American Judicature Society 48.

[30]Such an office exists in connection with the Cleveland Court and the Chicago Court. *Cf.* "Justice and the Poor", 48, 56; (1917) 1 Southwestern Law Rev. 100.

[31]Such a provision already exists in Massachusetts with regard to payment of debts contracted for necessaries or work and labor. 2 Mass. Rev. Laws (1902) p. 1535 § 168, sec. 80; and the provision including it has been declared constitutional, the court however not discussing the constitutionality of the instalment judgment. Brown's Case (1899) 173 Mass. 498, 53 N. E. 998.

[32]In the Municipal Court of Columbus, Ohio. Ohio Ann. Genl. Code, (P. & A., Supp. 1916) § 1558-54c.

[33]Cleveland, Columbus, Portland, Ore., New York, Chicago, Kansas City, Leavenworth, Topeka, Minneapolis, Atlanta, and Washington, D. C.

[34]Indiana, Michigan, North Dakota, and Wisconsin.

ciliation courts, these have either been disregarded entirely,[35] or fallen into disuse.[36] There seems, however, no reason why rural as well as city districts should not benefit by the introduction of small claims courts, and if the Massachusetts experiment is successful we may well look to see the small claims courts spread to the remotest corner of the states.

UNIFORM PROCEDURE AT LAW IN THE FEDERAL COURTS.—Since 1912 there has been before Congress a bill[1] for improving and simplifying proceedings at law in the federal courts which has commended itself to the foremost practioners of the country. The bill cloths the Supreme Court with power to formulate rules governing the entire pleading, practice and procedure at law in the federal courts, similar to the rules now governing equity and admiralty procedure, and in prescribing these rules the "Court shall have regard to the simplification of the system . . . , so as to promote the speedy determination of litigation on the merits." The American Bar Association has made a persistent, organized effort, since 1910, to procure passage of such a bill in the interests of a more easily accessible, more certain, less technical, and less expensive administration of justice in the national courts,[2] and its effort has been seconded in strong terms by both Ex-President Taft and President Wilson.[3]

The average lawyer entertains the opinion that federal practice and procedure at law, since the Conformity Act,[4] are simply the practice

[35]Wisconsin, (1914) 10 Wisconsin Bar Association Reports 206; and Michigan, where the only compliance with the constitutional provisions was the establishment of courts for the settlement of labor disputes. Renaud *v.* State Court of Mediation and Arbitration (1900) 124 Mich. 648, 83 N. W. 620.

[36]Indiana and North Dakota, (1914) 10 Wisconsin Bar Association Reports 224.

[1]S. B. No. 1214 and H. R. No. 133 of the 63rd Cong. (1st Sess.) are practically identical. Various other bills of like import have been introduced in both houses.

[2]See (1920) 6 Journ. Am. Bar Ass'n 509-527.

[3]In an official congressional message (Dec. 6, 1910) President Taft said: "One great crying need in the United States is cheapening the cost of litigation by simplifying judicial procedure and expediting final judgment . . . I am strongly convinced that the best method of improving judicial procedure at law is to empower the Supreme Court to do it through the medium of the rules of court, as in equity."

President Wilson in a speech at Indianapolis (Jan. 9, 1915) said: "I do know that the United States, in its judicial procedure, is many decades behind every other civilized government; and I say that it is an immediate and imperative call upon us to rectify that, because the speediness of justice, the inexpensiveness of justice, the ready access of justice is the greater part of justice itself." And in New York (Nov., 1916) he said: "The procedure of our courts is antiquated and a hindrance, not an aid, in the first administration of the law. We must simplify and reform it as other enlightened nations have done, and make courts of justice out of our courts of law."

[4](1872) 17 Stat. 197, §§ 5, 6, U. S. Comp. Stat. (1916) § 1537.

[5]*Ex parte* Fisk (1885) 113 U. S. 713, 720, 5 Sup. Ct. 724; Whitford *v.* Clark County (1886) 119 U. S. 522, 525, 7 Sup. Ct. 306; Luxton *v.* North River Bridge Co. (1893) 147 U. S. 337, 338, 13 Sup. Ct. 356.